(2014) 10 BOM CK 0064

In the Bombay High Court

Case No : Testamentary Suit No. 9 of 2003 in Testamentary Petition No. 834 of 2002

Dasappa Dhomba Karkera APPELLANT

Vs

Mahesh Dasappa Karkera RESPONDENT

Date of Decision : 08-10-2014

Acts Referred:

Citation : (2014) 10 BOM CK 0064

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : D.Y. Chitnis i/b. DDeepak Chitnis - Chiparikarand Co. Advocate, Advocate for the Appellant; Ajay Prajapati and J.S. Kini i/b. Suresh Dubey, Advocate for the Respondent

Judgement

R.S. Dalvi, J.

1. The testamentary suit is filed by the petitioner for letters of administration of the deceased Dasappa Dhomba Karkera with the will of the deceased dated 2nd August, 1996 annexed thereto. The deceased had 3 sons and 3 daughters. The deceased lived with one son, the caveator herein. The deceased has bequeathed the movable properties to his 3 daughters who were his joint holders in his investments. The deceased has bequeathed his immovable property being his residential flat to 5 out of his 6 children excluding only the caveator who lived with him. He has directed sale of the flat and equal distribution of the proceeds to his 5 children further directing that the caveator be vacated from the flat by his nominees who were his eldest daughter and youngest son. The deceased has declared that his son, the caveator herein who lived with him was not looking after and taking care of him in his old age. The will is attested by two witnesses on 2nd August, 1996 and registered before the Sub -Registrar of Assurances in the presence of two other witnesses being the Advocate of the deceased and the Executor appointed under the will also on 2nd August, 1996.

2. The caveator has essentially challenged the will on the ground that he has

sent monies from abroad and paid for the consideration of the flat and hence the flat belongs to him and it could not have been bequeathed to the other children of the deceased. The caveator has claimed that accordingly the will is bogus. The caveator / defendant has also claimed that the deceased was not in a sound and disposing state of mind at the time of the execution of the will and the signature on the will is not of the deceased.

3. Based upon the respective cases of the parties the following issues came to be framed which are answered as follows:

1. Whether plaintiff / petitioner proves that the execution of the will of Dasappa Domba Karkera is according to provisions of Law and the same is valid.

2. Whether the caveator / defendant proves that the signature on the will is not of the deceased.

3. Whether the caveator / defendant proves that the deceased at the time of the execution of the will was not in sound disposing mind or that the deceased has executed the will under undue influence.

4. What relief, if any, the petitioner is entitled to ?

4. The plaintiff examined himself, one attesting witness and the executing witness appointed under the will. The caveator / defendant examined himself. The issues in the suit will have to be decided upon considering the oral evidence of the parties alongside the documentary evidence more specially the contents of the will itself.

5. Issue No.1:

The will is seen to be most natural. The deceased had 6 children. He has provided for 5 of them. He has provided the movable properties equally for his 3 daughters. He has provided the immovable property equally for his 3 daughters and 2 sons with whom he had no grievance, quarrel or dispute. He has specifically excluded only one son, the caveator. This was though the caveator lived with the deceased. In fact a completely contrary will in which the entire estate is given only to the son who lived with the deceased would have been more unnatural. If the will was not executed by the deceased and the signature on the will was not that of the deceased and the will was got executed by the petitioner or any other of his children, the will would not have shown bequest to all the remaining 5 children almost equally.

6. Upon such a premise the evidence of the parties would have to be considered.

7. The evidence of the plaintiff shows that the deceased purchased the suit flat and paid the consideration therefor. It further shows that in 1992 the caveator started residing with the deceased. There were quarrels between the caveator and his wife and the deceased. They were cooking separately because of the bad treatment. The deceased was made to live at different places, even with his married daughters. Her evidence shows that he used to visit the flat despite

living elsewhere and paid the maintenance directly in the office of the society. The deceased had executed nominations in respect of his flat.

8. She has further deposed that her father executed the will which was registered and kept with the executor in a cover titled "to be opened in the presence of my children after 15 days" of his death. The plaintiff has relied upon the original cover of the will also which has been produced before the Court along with the original will which was deposited in the office of the Prothonotary and Senior Master of this Court.

9. She has further deposed that the will was read as per the instructions of the deceased by the executor and thereafter the executor made copies thereof and gave all the children. She has also deposed about the Doctor''s certificate dated 1st August, 1996 upon the medical examination of the deceased. Because the executor renounced his right, the plaintiff who is one of the beneficiaries applied for letters of administration with the will of the deceased annexed thereto.

10. The cross examination of the plaintiff would show the case of the caveator / defendant that after the death of the wife of the deceased the temperament of the deceased had changed. He had stopped meeting people. The plaintiff has reiterated in her cross examination about the ill-treatment the caveator meted out to the deceased though no complaint was filed by the deceased with the police as he was a man with self respect. Her cross examination would also show that she did not know the attesting witnesses who were known to the deceased. She knew them only after she saw that they had attested the will. Even the attesting witness became her husband''s friend only after the attestation. She has refuted the case of the caveator / defendant that the attesting witnesses were her husband''s friends prior to the execution of the will in 1996. Her cross examination shows that the Doctor who examined the deceased was her family Doctor. The caveator / defendant has relied much upon the evidence that the plaintiff admitted that the deceased continued to stay in the suit flat because of his good relations with the defendant at the fag end of the cross examination.

11. The attesting witness of the will upon its execution by the deceased has identified all the signatures on the will. He has also deposed about the good and disposing mind, memory and understanding of the deceased at the time of the execution of the will.

12. His cross examination would show that he knew the deceased from 1974 -75 when he was having some problems and had known the deceased because he was a spiritual man. He had met the deceased 40 to 50 times. He had visited his residence only once. He did not know about the family of the deceased. He knew about the building where the deceased lived which was near Panjarpole. He met the deceased in 1996 about 3 to 4 times before the execution of the will. He later knew that the wife of the deceased expired suddenly on 13th December 1995 and thereafter the deceased never attended any family functions. His discussions with the deceased was only about his own problems. He did not notice any

change in the nature of the deceased. He met the other attesting witness for the first time at the time of the execution and attestation of the will on 2nd August, 1996 when he was introduced to the other attesting witness of the deceased. He knew the plaintiff ''s husband also 4 or 5 months before the evidence. He was introduced to the Advocate of the plaintiffs by the plaintiff and her husband. The detailed cross examination of the attesting witness in fact clarifies his relationship, his independence and the attestation itself.

13. The executor appointed under the will has deposed that he had accompanied the deceased on 2nd August 1996 to the office of the Sub -Registrar and Assurances for execution of the will which the deceased had executed on that day. He has deposed how the deceased got the will registered and thereafter received it from the Registrar ''s office by registered post. Thereafter the deceased again called him at the place of his daughter and handed over to him a sealed cover with his signatures thereon for safe custody. The deceased orally instructed him that it should be opened only after his demise. The deceased endorsed his name and the instructions on the envelope. That is an envelope which has been produced before the Prothonotary and Senior Master of this Court.

14. He has also deposed about how he read the will to all the heirs except one son Jaiprakash who was residing in the USA after the death of the deceased. He has also deposed about how he took out photocopies and gave each of the heirs and obtained their signatures in acknowledgment.

15. His cross examination shows that he knew all the family members of the deceased. The family were residing in the Mulund flat. The married daughters moved out. Only the caveator lived with the deceased. Another son lived in the USA. Yet another son lived at Marol. The deceased had called him at his residence to accompany him to the Registrar ''s office. No one else was present in the flat then. To the specific case of the temperament of the deceased he deposed that he was a normal person. He knew about the demise of the wife of the deceased. He waited after the death of the deceased to read the will. He deposed about who else was present in the Registrar ''s office at the time of registration. That was Advocate one Mr. Nayak whom he did not know. His cross examination shows a neat state of affairs in performance of his duties as executor.

16. The evidence of the caveator / defendant shows that the deceased was not in a proper state of mind despite the specific evidence of the attesting witness that he was in a sound and disposing state of mind which has not been challenged. The caveator has not proved how the deceased was not in a fit state of mind except to state that he was depressed after the sudden death of his wife. That would not dis -entitle him or incapacitate him to make his will several months thereafter. In fact that would be a good ground to make the kind of will that the deceased has made.

17. It is argued on behalf of the caveator / defendant that the consideration paid by him has been ignored and the flat would belong to him. There is another litigation between the parties with regard to the flat of the deceased. It would be for the caveator to show his title in that suit or to prove it in any suit filed by him. That would not be any reason to refuse probate.

18. The above evidence shows a perfect execution of the will of the deceased, its subsequent registration and its deposit in an envelope with specified directions to the executor which have come to be followed by the executor. The will is validly executed by the testator whose signature has been proved by the attesting witnesses on the will and by the executor at the time of the registration of the will. Hence issue No. 1 is answered in the affirmative.

19. Issue Nos. 2 and 3 :

No evidence of any forgery or even any circumstantial evidence to show forgery or unsound mind of the testator is led.

20. The caveator / defendant has failed to prove forgery of the will or the lack of sound mind of the testator. Hence issue Nos. 2 and 3 are answered in the negative.

21. Hence following order:

1. The last will and testament of the deceased has been validly executed.

2. Letters of Administration with the last will of the deceased dated 2nd August, 1996 annexed thereto shall be issued by the Prothonotary and Senior Master of this Court.

3. Drawn -up decree is dispensed with.

4. Interim order dated 17th June, 2005 shall continue until 15th November, 2014.

